

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

GREGORY GRAHAM,

Plaintiff,

CASE NO. 1:16-CV-149

v.

HON. ROBERT J. JONKER

DOUGLAS MURLAND,

Defendant.

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**ORDER APPROVING AND ADOPTING
REPORT AND RECOMMENDATION**

The Court has reviewed Magistrate Judge Green’s Report and Recommendation in this matter (ECF No. 40) as well as Defendant’s Objection (ECF No. 42). Under the Federal Rules of Civil Procedure where, as here, a party has objected to portions of a Report and Recommendation, “[t]he district judge . . . has a duty to reject the magistrate judge’s recommendation unless, on de novo reconsideration, he or she finds it justified.” 12 WRIGHT, MILLER, & MARCUS, FEDERAL PRACTICE AND PROCEDURE § 3070.2, at 381 (2d ed. 1997). Specifically, the Rules provide that:

[t]he district judge must determine de novo any part of the magistrate judge’s disposition that has been properly objected to. The district judge may accept, reject, or modify the recommended disposition; receive further evidence; or return the matter to the magistrate judge with instructions.

FED R. CIV. P. 72(b)(3). De novo review in these circumstances requires at least a review of the evidence before the Magistrate Judge. *Hill v. Duriron Co.*, 656 F.2d 1208, 1215 (6th Cir. 1981).

The Magistrate Judge recommends denying Defendant's motion for summary judgment because there is a genuine issue of material fact regarding the identity of the officer who used a taser against Plaintiff. (ECF No. 40, PageID.239). Defendant objects that the Plaintiff relies solely on unsworn statements and his verified Complaint, and that this is not enough to create a genuine issue of material fact. The Court disagrees. The sworn complaint identifies Defendant Murtland; and Defendant Murtland says otherwise. Defendant Murtland's story may ultimately be much more believable, but this is a classic fact issue on involvement. Defendant seeks more from Plaintiff than is required at this stage. It is not necessary for a plaintiff to repeat a verified Complaint's allegations in a responsive affidavit to survive a summary judgment motion. *Roberson v. Hayti Police Dept.*, 241 F.3d 992, 995 (8th Cir. 2001).

For these reasons, the Court agrees with the Magistrate Judge that Defendant's motion for summary judgment should be denied. The denial is without prejudice to whether the deployment of the taser was reasonable as a matter of law for qualified immunity purposes.

ACCORDINGLY, IT IS ORDERED that the Report and Recommendation of the Magistrate Judge (ECF No. 40) is **APPROVED AND ADOPTED** as the Opinion of the Court.

IT IS FURTHER ORDERED that Defendant's Motion for Summary Judgment (ECF No. 32) is **DENIED WITHOUT PREJUDICE**

Dated: November 7, 2018

/s/ Robert J. Jonker
ROBERT J. JONKER
CHIEF UNITED STATES DISTRICT JUDGE